Appx 17-207 — Mr Jas L Davis

Mr Justice Field delivered

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~502.~~ ~~280~~ 65

EUGENE B. ALLEN AND ALEXANDER STREET, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED FEBRUARY 11, 1871.

Dec 1873

SUPREME COURT OF THE UNITED STATES.

No. 502.

EUGENE B. ALLEN AND ALEXANDER STREET, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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1 (Copy.)

[Filed July 18, 1864.]

To the honorable the justices of the Court of Claims of the United States:

EUGENE B. ALLEN AND ALEXANDER STREET
vs.
THE UNITED STATES. } 2129.

Respectfully represent, Eugene B. Allen and Alexander Street, the said Eugene B. Allen, of the county of Leavenworth, in the State of Kansas, and the said Alexander Street, of the county of Otoe, in the Territory of Nebraska, that, on or about the day of November, A. D. 1861, the said Allen and Street entered into a verbal contract with the said United States, by and through Major L. C. Easton, then a quartermaster in the Army of the United States, in and by which the said claimants agreed to sell and deliver to the said United States, and the said United States agreed to purchase and receive of these claimants, at Fort Leavenworth, in the State of Kansas aforesaid, from one hundred and sixty (160) to two hundred and seventy-three (273) wagons, with outfit complete, and a sufficient number of oxen for the same, counting five (5) yoke of oxen to each wagon, at and for the following prices, that is to say, for the wagons, with outfit, one hundred forty-six and $\frac{25}{100}$ dollars ($146 25) each, and for the oxen fifty-five dollars ($55 00) each yoke.

And these claimants further represent that the said Major L. C. Easton, as said quartermaster, had full power and authority to make said contract in behalf of the said United States, and that the same was made by him in the usual course of his business and official duties as such quartermaster.

And these claimants further represent that, in pursuance of the terms of said contract, and on or about the first day of November, 1861, they sold to the said United States, and delivered to the said Major L. C. Easton, as such quartermaster, at Fort Leavenworth aforesaid, two hundred and seventy-three (273) wagons, with outfits complete, and one thousand three hundred and twelve and one-half (1,312½) yoke of oxen; that the same were fully worth the said prices agreed to be paid therefor, and were purchased by the United States from these claimants, as aforesaid, for the purpose of being used in the military service of the United States.

These claimants also represent that, on or about the said first day of November, 1861, and upon and after the sale and delivery of said cattle and wagons as aforesaid, the said Major L. C. Easton, as such quartermaster, issued and delivered to these claimants vouchers or certificates for said property, so sold and delivered as aforesaid, to the amount of one hundred and twelve thousand one hundred and thirteen and $\frac{75}{100}$ dollars, ($112,113 75,) that being the full amount agreed to be paid therefor; copies of which said vouchers are hereto attached, marked and numbered respectively 1, 2, 3, 4, 5, 6, and 7, and made a part of this complaint.

And these claimants further show that the said vouchers numbered 4, 5, 6, and 7 were paid to the holders thereof by the said United States soon after the same were issued, but that vouchers numbered 1, 2, and 3 have not been paid, or any part thereof, except the sum of seventeen thousand seven hundred and twenty-seven and $\frac{50}{100}$ dollars, ($17,727 50.)

And these claimants further represent that they have frequently called upon the War Department for the payment of said unpaid claims; that the said Department has not paid the same or any part thereof, but has wholly neglected and refused such payment.

And these claimants further represent that they are and at all times have been the legal owners of the said unpaid vouchers and claims; and that they have at all times borne true allegiance to the Government of the United States, and that they have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

And these claimants further represent that the United States are legally and equitably indebted to them for and on account of said cattle and wagons, so sold and delivered, in the full and just sum of seventy-one thousand and four hundred and ninety-one and $\frac{25}{100}$ dollars, ($71,491 25,) and are by law and in equity bound to pay the same, together with interest thereon at the rate of seven (7) per cent. per annum from the first day of November, 1861.

And thereupon these claimants pray that the said United States may be adjudged to pay them the amount of their said claim as above set forth, to wit, the sum of seventy-one thousand four hundred and ninety-one and $\frac{25}{100}$ dollars, together with the interest thereon at the rate of seven per cent. per annum from November 1, 1861.

W. P. GAMBELL, *Counsel.*

Address: *Leavenworth, Kansas.*

2

(Signed) EUGENE B. ALLEN.
ALEXANDER STREET,
P'r EUGENE B. ALLEN.

Address of claimants: *Leavenworth, Kansas.*

I, Eugene B. Allen, of the city and county of Leavenworth, in the State of Kansas, one of the above-named claimants, on oath depose and say that no assignment or transfer of said claims, or any part thereof, or any interest therein has been made except as in said petition stated; that said claimants are justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; and that I believe the facts as stated in said petition are true.

(Signed) EUGENE B. ALLEN.

JULY 12, 1864.

DISTRICT OF KANSAS, *County of Leavenworth, set:*

Then personally appeared the above-named Eugene B. Allen, and made oath to the truth of the above-named affidavit by him subscribed, according to the best of his knowledge and belief.

Before me,

EBENEZER N. O. CLOUGH,
Commissioner of the Court of Claims of the United States.

(1.)

The United States to Street & Allen, Dr.

Date of purchase.		Dollars.	Cents.
Nov. 1, 1861.	For 87 yoke of oxen, @ $55	4,785	
	47 wagons, @ $146 25	6,873	75
		11,658	75

I certify that the above account is correct and just, and that the articles have been accounted for on my property return for the quarter ending on the 30th of December, 1861.

(Signed) L. C. EASTON, *Quartermaster.*

(2.)

The United States to Street & Allen, Dr.

Date of purchase.		Dollars.	Cents.
Nov. 1, 1861.	For 902½ yoke of oxen, @ $55	49,637	50
	158 wagons, @ $146 25	23,107	50
		72,745	00

I certify that the above account is correct and just, and that the articles have been accounted for on my property return for the quarter ending on the 30th December, 1861.

(Signed) L. C. EASTON, *Quartermaster.*

(3.)

The United States to Street & Allen, Dr.

Date of purchase.		Dollars.	Cents.
Nov. 1, 1861.	For 45 yoke of oxen, @ $55	2,475	00
	16 wagons, @ $146 25	2,340	00
		4,815	00

I certify that the above account is correct and just, and that the articles have been accounted for on my property return for the quarter ending on the 30th December, 1861.

(Signed) L. C. EASTON, *Quartermaster.*

3 (4.)

The United States to Street & Allen, Dr.

Date of purchase.		Dollars.	Cents.
Nov. 1, 1861.	For 201 yoke of oxen, @ $55	11,055	00
	41 wagons, @ $146 25	5,996	25
		17,051	25

I certify that the above account is correct and just, and that the articles have been accounted for on my property return for the quarter ending on the 30th of December, 1861.

(Signed) L. C. EASTON, *Quartermaster.*

(5.)

The United States to Street & Allen, Dr.

Date of purchase.	Dollars.	Cents.
Nov. 1, 1861. For 30 yoke of oxen, @ $55	1,650	00

I certify that the above account is correct and just, and that the articles have been accounted for on my property return for the quarter ending on the 30th of December, 1861.

(Signed) L. C. EASTON, *Quartermaster.*

(6.)

The United States to Street & Allen, Dr.

Date of purchase.	Dollars.	Cents.
Nov. 1, 1861. For 40 yoke of oxen, @ $55.....	2,200	00
8 wagons, @ $146 25.....	1,170	00
	3,370	00

I certify that the above account is correct and just, and that the articles have been accounted for on my property return for the quarter ending on the 30th of December, 1861.

(Signed) L. C. EASTON, *Quartermaster.*

(7.)

The United States to Street & Allen, Dr.

Date of purchase.	Dollars.	Cents.
Nov. 1, 1861. For 7 yoke of oxen, @ $55.....	385	00
3 wagons, @ $146 25.....	438	75
	823	75

I certify that the above account is correct and just, and that the articles have been accounted for on my property return for the quarter ending on the 30th of December, 1861.

(Signed) L. C. EASTON, *Quartermaster.*

4 In the Court of Claims. October term, 1864.

EUGENE B. ALLEN & AL. *vs.* THE UNITED STATES. } No. 2129.

And now come the United States, by Charles Gibson, their solicitor, and say that they are not indebted unto the said claimant in the said sum of $71,491 25, nor any part thereof.

And as to so much of said petition as avers that the claimant has, at all times, borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encourage-

ment to rebellion against the said Government, the said defendants say that they are not advised of the truth of said allegations, and therefore deny the same.

JNO. A. BINGHAM,
Solicitor for United States.

AUG. 20, 1864.

(Indorsed:) No. 2129. Eugene B. Allen & Alex'r Street vs. U. S. Traverse. Filed Aug. 23, 1864. *Filed Aug't 23d*, 1864.

5 United States Court of Claims. December term, 1868.

EUGENE B. ALLEN AND ALEXANDER STREET
vs.
THE UNITED STATES. } No. 2129.

The defendants, by their Attorney General, come and say that the said claimants ought not to have or maintain their said action against the defendants, for these reasons, viz:

The oxen and wagons alleged in the claimants' petition to have been sold to the defendants, and for which the vouchers set forth in the said petition were given, were not the property of the said claimants, but were held by them in trust for the creditors of the firm of Russell, Majors & Waddell, under an assignment executed by the said firm to the claimants for the benefit of such creditors.

The said firm of Russell, Majors & Waddell, at the time said assignment was so executed as aforesaid, were, and still are, wholly insolvent.

At the time the said firm of Russell, Majors & Waddell so executed the said assignment as aforesaid, they were indebted to the defendants, and still are so indebted, in a sum greatly exceeding the amount claimed in the claimants' petition, and exceeding the entire assets of the said firm of Russell, Majors & Waddell. All of which the defendants are ready to verify.

T. LYLE DICKEY,
Ass't Att'y Gen'l.

Filed Jan'y 13, 1869.

6 In the Court of Claims. Dec. term, 1868.

EUGENE B. ALLEN, ALEX'R STREET,
vs.
THE UNITED STATES. } No. 2129.

Now comes the said claimants, by Hughes, Denver & Peck, their solicitors, and, as to the last special plea of the said defendant, filed by the Assistant Attorney General, say precludi non, because they, the said firm of Russell, Majors and Waddell were not and are not indebted to the said defendants as alleged in the said plea, or any other sum; and that said firm of Russell, Majors and Waddell were not and are not insolvent, as alleged in said plea; and that said firm of Russell, Majors & Waddell did not make an assignment for the benefit of creditors of all their property, as is alleged in said plea. And of these facts the plaintiffs take issue, and the said plaintiffs say that said plea is not sufficient in law, and they ought not to be barred of their said suit by anything therein contained. Wherefore they pray judgment.

Filed Jan'y 26, 1869.

HUGHES, DENVER & PECK,
Att'ys for Claimants.

7 In the Court of Claims. Dec. term, 1869.

ALLEN & STREET
vs.
THE UNITED STATES. } 2129.

The defendants, by their Attorney General, come and move the court for an order requiring the claimants in this case so to amend their petition as to make the same conform to the proofs, viz, that they present the claim as assignees of William H. Russell, Alexander Majors, and William B. Waddell, late partners under the firm-name of Russell, Majors & Waddell.

THOMAS H. TALBOT,
Ass't Att'y Gen'l.

Filed Dec. 9, 1869.
Motion submitted with the case.

8 In the Court of Claims. Dec. term, 1869.

ALLEN & STREET
vs.
THE UNITED STATES. } 2129.

Now comes the said claimants, by their att'ys, & move the court to exclude all the testimony of W'm H. Russell, which relates to the indebtedness of Russell, Majors & Waddell.

HUGHES DENVER & PECK,
Att'ys for Claimants.

Filed Dec. 14, 1869.
Motion submitted with case.

9 In the Court of Claims.

EUGENE B. ALLEN AND ALEXANDER STREET
vs.
THE UNITED STATES. } 2129.

And now, to wit, eleventh of April, A. D. 1870, the court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said claimants take nothing by their petition, and that the same be dismissed.
By the court.
A true copy of record.

10 In the Court of Claims. Dec. term, 1869.

EUGENE B. ALLEN & ALEXANDER STREET
vs.
THE UNITED STATES. } 2129.

Now come the said claimants in open court, and pray that an appeal be allowed to the Supreme Court of the United States from the judgment rendered in this cause, April 11, 1870.

HUGHES, DENVER & PECK,
Att'ys of Record.

Filed in clerk's office, April 18, 1870.

Ordered, that the appeal as prayed in *in* the case of Allen & Street vs. The United States be allowed.

By the court.

April 18, 1870.

11 In the United States Court of Claims.

ALLEN & STREET
vs.
THE UNITED STATES. } 2129.

The finding of facts and the conclusions of law on said facts on which the court founded its judgment.

This cause coming on to be heard the eleventh day of April, 1870, before the judges of the Court of Claims, the said court finds as matters of fact:

1. On the 1st day of November, 1861, the claimants, Street & Allen, sold and delivered to Major L. C. Easton, a quartermaster in the United States Army, and for the use of the United States, 273 wagons, at the price of $146 25 for each wagon; and also, one thousand three hundred and twelve and a half yoke of oxen, at the price of $55 per yoke for such oxen, amounting, in the aggregate, to the sum of $112,113 75. And for this sum Major Easton issued to the claimants vouchers in due and proper form, being the vouchers appended to, and forming part of, the petition. We also find that Major Easton had full authority
12 to make the purchase, and that the property was of the value agreed to be paid for the same; and that it was used by the United States, and their title and possession to the same has not been in any way disputed or disturbed; and that the sum of $71,491 25 still remains unpaid upon the said vouchers, the balance having been paid by the United States to the claimants.

2. We find further that, on the 25th and 26th days of January, A. D. 1861, Russell, Majors & Waddell executed and delivered to the claimants two several deeds of assignment, in trust for their creditors, therein designated, which deeds of assignment are here referred to and made part of this statement of facts, together with the schedules accompanying the said deeds of assignment respectively, the said Russell, Majors & Waddell then and there being wholly insolvent. And we find that said deeds together convey all the property of Russell, Majors & Waddell in trust for the benefit of their creditors.

3. We further find that the amount claimed in this suit is for the price of so much of the property sold and delivered to the United States, as already stated, as had belonged to Russell, Majors & Waddell,
13 and was conveyed to the claimants in trust for creditors by the deeds of assignment already recited.

4. We find that, at the date of the assignments heretofore set forth by Russell, Majors & Waddell to the claimants in trust for creditors, the said Russell, Majors & Waddell were indebted to the United States in the sum of $870,000, or thereabouts, for certain Indian trust bonds belonging to the United States, which the said Russell, Majors & Waddell, through the collusion and connivance of certain officers of the United States in charge and custody of said bonds, illegally procured, and negotiated and sold the same, and applied the proceeds thereof to their own use; and the amount thereof, with interest thereon from the 1st of October, 1860, is still due and owing from Russell, Majors & Waddell

to the United States; but the United States have never prosecuted such indebtedness to judgment, and the same is still an unliquidated demand, disputed and denied by Russell, Majors & Waddell.

5. That the claimants received, under the deeds of assignment recited, property of the assignors over and above that the price of which is claimed in this suit, amounting to $150,000. The claimants have not proved what disposition has been made of the same, nor have they shown what are or have been the expenses of the execution of
14 the trust; nor have they shown that they have complied with the laws of Missouri relating to assignments made in trust for the benefit of creditors; nor that they have given good and sufficient security for the faithful execution and performance of the said trust.

6. The claimants have at all times borne true allegiance to the Government of the United States, and they have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

And upon the facts so found the court ruled as matter of law—

1st. That the United States are entitled to priority of payment out of the proceeds of the property assigned to claimant by Russell, Majors & Waddell under the trust deeds recited.

2ond. That the money in suit, being the proceeds of such property, is not in law subject to any prior charge or lien in the hands of claimants.

3rd. That the United States may, under and by virtue of the
15 act of Congress of March 3, 1863, section 5, entitled "An act to amend 'An act to establish a court for the investigation of claims against the United States,' approved February 24, 1855," set off so much of the indebtedness of Russell, Majors & Waddell to them as shall be equal to the amount claimed and proved in this suit by Allen & Street, the claimants. And the claimants' petition is dismissed.

By the court.

(Indorsed:) Allen & Street vs. The United States.

16 In the Court of Claims.

EUGENE B. ALLEN AND ALEXANDER STREET
vs.
THE UNITED STATES. } No. 2129.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the counsel for claimants for the allowance of an appeal, as filed in the clerk's office April 18, 1870, and of the order of the court of 18 April, 1870, allowing the same; of the finding of facts, and the conclusions of law on said facts, on which the court founded its judgment.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 26th day of January, 1871.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 502. Eugene B. Allen and Alexander Street, appellants, vs. The United States. Court of Claims. Filed 11th February, 1871.

Supreme Court of the United States.

DECEMBER TERM, 1871.

No. 280.

EUGENE B. ALLEN and ALEXANDER STREET, Appellants,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Brief for Appellants.

WASHINGTON, D. C.
W. H. MOORE, PRINTER, 511 ELEVENTH STREET.
1872.

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

No. 280.

EUGENE B. ALLEN AND ALEXANDER STREET,
APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Brief for Appellants.

STATEMENT OF THE CASE.

Suit was brought in the Court of Claims by appellants to recover the amount of certain quartermaster's vouchers, copies of which are appended to the petition.—(See Record, pp. 2, 3, and 4.)

The Court of Claims find that the vouchers were regular in every respect, establishing a *prima facie* case against the United States.—(Record, p. 7.)

The loyalty of the claimants is fully established.—(Finding No. 6 of the Court—Record, p. 8.)

The defence made by the Government was that a certain firm, styled Russell, Majors & Waddell, were indebted to the United States, and were insolvent, and had made an assignment of their property to the appellants, in trust for the benefit of their creditors—that the appellants had sold a portion of this property to the U. States, in payment for

which the vouchers, sued on, were issued, and that the United States, being entitled to priority of payment in cases of assignment for benefit of creditors, under the provisions of certain acts of Congress, could set off against these vouchers the indebtedness of Russell, Majors & Waddell to the Government.

And this defence, both as to matter of fact and matter of law, was sustained by the Court of Claims.—(See Finding and Opinion of the Court—Record, pp. 7 and 8.)

From the above decision the claimants appealed.

Assignment of Error.

The Court of Claims erred in holding the unliquidated claim of the United States against Russell, Majors & Waddell to be a valid set-off against the vouchers on which the suit was brought by the appellants.

Points for the Appellants.

1. The right of the United States to priority of payment in certain cases of assignment, as conferred by the acts of Congress and judicially expounded by this Court, does not apply in this case upon the facts as found by the Court of Claims.

The acts of Congress relied on are to be found in Statutes at Large, vol. 1, p. 515, § 5, and in the same volume, pp. 676–7, § 65.

Concerning the construction of these acts of Congress, the Court is referred to the following authorities.

Conard vs. *The Atlantic Ins. Co.*, 1 Peters, 386—439.

Brent vs. *The Bank of Washington*, 10 Peters, 596.

Bearton vs. *The Farmers' Bank of Delaware*, 12 Peters, 102.

The United States vs. *Hunter*, 5 Mason, 229.

These authorities clearly establish that the right of priority is limited to payment out of the proceeds of the trust

fund after the trust has been properly executed, its expenses paid, etc., and does not confer a power to prevent the execution of the trust by seizing the property assigned or its proceeds after sale.

2. The right of set-off in the Court of Claims, as conferred by the act of March 3, 1863, § 3, does not apply in this case.—12 Stat. at Large, p. 765.

3. The findings of the Court of Claims show affirmatively that the claim which was set off against the appellants' vouchers, was an unliquidated and disputed claim which the Government had never established, nor prosecuted to judgment, against Russell, Majors & Waddell, the peculiar character of which was such, that it could not be paid and adjusted by the claimants acting as trustees under the assignment.—(See Finding No. 4—Record, p. 7.)

4. It was competent for the United States to waive its right of priority of payment under the deeds of assignment, and the voluntary purchase of the property and delivery of the formal vouchers sued upon, constitute such waiver.

JAMES HUGHES,

Counsel for Appellants.

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

EUGENE B. ALLEN AND ALEXANDER STREET, APPELLANTS,
vs.
THE UNITED STATES.
} No. 280.

Brief for the United States.

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

EUGENE B. ALLEN AND ALEXANDER Street, appellants,
vs.
THE UNITED STATES.
} No. 280.

Brief for the United States.

STATEMENT.

The findings of fact by the Court of Claims in this case are as follows:

1. On the 1st day of November, 1861, the claimants, Street & Allen, sold and delivered to Major L. C. Easton, a quartermaster in the United States Army, and for the use of the United States, 273 wagons, at the price of $146.25 for each wagon; and also, one thousand three hundred and twelve and a half yoke of oxen, at the price of $55 per yoke for such oxen, amounting, in the aggregate, to the sum of $112,113.75. And for this sum Major Easton issued to the claimants vouchers in due and proper form, being the vouchers appended to, and forming part of, the petition. We also find that Major Easton had full authority to make the purchase, and that the property was of the value agreed to be paid for the same; and that it was used by the United States, and their title and possession to the same has not been in any way disputed or dis-

turbed; and that the sum of $71,491.25 still remains unpaid upon the said vouchers, the balance having been paid by the United States to the claimants.

2. We find further that, on the 25th and 26th days of January, A. D. 1861, Russell, Majors & Waddell executed and delivered to the claimants two several deeds of assignment, in trust for their creditors, therein designated, which deeds of assignment are here referred to and made part of this statement of facts, together with the schedules accompanying the said deeds of assignment respectively, the said Russell, Majors & Waddell then and there being wholly insolvent. And we find that said deeds together convey all the property of Russell, Majors & Waddell in trust for the benefit of their creditors.

3. We further find that the amount claimed in this suit is for the price of so much of the property sold and delivered to the United States, as already stated, as had belonged to Russell, Majors & Waddell, and was conveyed to the claimants in trust for creditors by the deeds of assignment already recited.

4. We find that, at the date of the assignments heretofore set forth by Russell, Majors & Waddell to the claimants in trust for creditors, the said Russell, Majors & Waddell were indebted to the United States in the sum of $870,000, or thereabouts, for certain Indian trust bonds belonging to the United States, which the said Russell, Majors & Waddell, through the collusion and connivance of certain officers of the United States in charge and custody of said bonds, illegally procured, and negotiated and sold the same, and applied the proceeds thereof to their own use; and the amount thereof, with interest thereon from the 1st of October, 1860, is still due and owing from Russell, Majors & Waddell to the United States; but the United States have never prosecuted such indebtedness to judgment, and the same is still an unliquidated demand, disputed and denied by Russell, Majors & Waddell.

5. That the claimants received, under the deeds of assignment recited, property of the assignors over and above that the price of which is claimed in this suit,

amounting to $150,000. The claimants have not proved what disposition has been made of the same, nor have they shown what are or have been the expenses of the execution of the trust; nor have they shown that they have complied with the laws of Missouri relating to assignments made in trust for the benefit of creditors; nor that they have given good and sufficient security for the faithful execution and performance of the said trust.

6. The claimants have at all times borne true allegiance to the Government of the United States, and they have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

And upon the facts so found the court ruled as matter of law—

1st. That the United States are entitled to priority of payment out of the proceeds of the property assigned to claimant by Russell, Majors & Waddell, under the trust deeds recited.

2nd. That the money in suit, being the proceeds of said property, is not in law subject to any prior charge or lien in the hands of claimants.

3rd. That the United States may, under and by virtue of the act of Congress of March 3, 1863, section 5, entitled "An act to amend 'An act to establish a court for the investigation of claims against the United States,' approved February 24, 1855," set off so much of the indebtedness of Russell, Majors & Waddell to them as shall be equal to the amount claimed and proved in this suit by Allen & Street, the claimants. And the claimants' petition is dismissed.

(Record, pages 7 and 8.)

ARGUMENT.

I.

The late firm of Russell, Majors & Waddell executed and delivered to the claimants, on the 25th and 26th days of January, 1861, two deeds of assignments conveying

their property in trust for the benefit of their creditors These assignees, afterward, in the same year, sold to the Government a portion of the property conveyed by these assignments, and as Russell, Majors & Waddell were indebted to the United States, in a sum largely exceeding the proceeds of the sale, the Government refused to pay for the property. The third finding of fact by the Court of Claims states "that the amount claimed in this suit is for the price of so much of the property sold and delivered to the United States, as had belonged to Russell, Majors & Waddell, and was conveyed to the claimants in trust for creditors by the deeds of assignment." The only title in this property in the claimants therefore was such as they acquired as assignees of Russell, Majors & Waddell.

The fourth finding of fact by the Court of Claims is to the effect that, at the date of these assignments, Russell, Majors & Waddell were indebted to the United States in the sum of $870,000, or thereabouts, for certain Indian trust bonds belonging to the United States, which that firm illegally procured, negotiated, and sold, and the proceeds of which they appropriated to their own use.

The second finding establishes the fact that, at the time of the assignment, Russell, Majors & Waddell were "wholly insolvent." The indebtedness to the United States, the insolvency, and the assignment bring the case within the provisions of the act of March 3, 1797, section 5 (1 Stat. 515,) that "when any revenue officer or other person hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent * * * * the debt due to the United States shall be first satisfied; and the priority hereby established shall be deemed to extend as well to cases in which a debtor not having sufficient property to pay all his debts shall make a voluntary assignment thereof * * * * * as to cases in which an act of legal bankruptcy shall be committed."

As against these assignees who are here the appellants, the United States would have priority in the settlement of the insolvent state of Russell, Majors & Waddell.

United States *vs.* Fisher, 2 Cranch, 358.
Harrison *vs.* Sterry, 5 Cranch, 289.
United States *vs.* State Bank of North Carolina, 6 Peters, 29.

The claimants, in the court below, endeavored to give their action the color of an individual suit; but the findings of fact of that court, before cited, show that the claimants were acting as the representatives of the insolvent estate, and identify the property, for which payment is sought, as having belonged to the insolvent firm.

II.

Section 3, act of March 3, 1863, relating to the Court of Claims is as follows:

"That said court, in addition to the jurisdiction now conferred by law, shall also have jurisdiction of all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government, against any person making claim against the Government in said court; and upon the trial of any such cause, it shall hear and determine such claim or demand both for and against the Government and claimant," &c. The powers conferred on the Court of Claims by this act cover the present case. We have seen that Russell, Majors & Waddell, were indebted to the United States at the time of their assignment in a sum exceeding the amount here in dispute; that the United States were entitled to priority of payment out of the proceeds of property conveyed by the assignment; and that the property for which compensation was sought by the claimants in the court below was a part of the very property so assigned. The claim of the United States against the assignees of insolvent debtors is a proper set-off in a suit by those assignees to recover for the proceeds of the assigned estate.

Stewart *vs.* Anderson, 6 Cranch, 203.
Marks *vs.* Barker, 1 Wash. C. C., 178.
Myers *vs.* United States, 1 McLean, 493.

Bemis *vs.* Smith, 10 Met., 194.
Sheldon *vs.* Kendall, 7 Cush., 217.
Blakesley *vs.* Smallwood, 8 Q. B, 538.

The principle upon which courts have refused, in the case of a suit by an executor, to allow debts due by the deceased in his life-time to be set off against demands which have accrued to his executor since his death is, that this would interfere with the regular course of distribution, and has no application to this case, because the Government is entitled to priority of payment.

Shipman *vs.* Thompson, Willes, 102.
Watts *vs.* Rees, 9 Exch., 695, 11 Exch., 410.
Dale *vs.* Cooke, 4 Johns, Ch. 11.

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